

APPEAL FROM ORIGINAL DECREE No.244 OF 1980

AGAINST THE JUDGMENT DATED 12.11.1979 AND DECREE DATED
18.1.1980 PASSED BY SRI P. XAXA , ADDITIONAL SUB JUDGE-IV,GAYA
IN MONEY SUIT NO. 2 OF 1978 / 79 OF 1972.

THE STATE OF BIHAR & ANOTHER----- --Appellants.

- Versus-

S. GHEYASUDDIN-----Respondent.

For the Appellant: Mr. Narmadeshwar Jha, A.A.G.7 and Mr.Sanjeev
Kumar,Advocate.

For the Respondent: Mr.RaghibAhsan,Senior Advocate with Mr.K.Pd.
Gupta,Advocate.

P R E S E N T

THE HON'BLE JUSTICE SMT. SHEEMA ALI KHAN

Sheema Ali Khan, J. This appeal arises out of Money Suit No.2 of 1978/ 79 of
1972 dated 12.11.1979 passed by the Additional Sub Judge-IV, Gaya
by which he has decreed the plaintiff 's suit.

The plaintiff had filed the suit praying therein that the court
may grant him a decree of Rs.17560/- and direct the state authorities
to return the earnest money and has also filed the suit for payment of
Rs.62658.43 paise as cost incurred by him for performing the work in
question.

The plaintiff's case is that he is a contractor and runs a
business in the name and style of S. Nizamuddin & Sons having its
Headquarters at Gaya. The defendant no.2 invited a tender for
construction of a Submersible bridge over river Dhanrajay on Gaya-
Fatehpur-Sirdalla Rajauli Road at an estimated cost of Rs.3,86,630/-.

The plaintiff's being the lowest bid the contract was granted to him, and it is his claim that he began to perform the job allotted to him and while he was doing the digging work he discovered that the soil in question was water charged, the plaintiff found it is impossible to do the work within the rate stipulated by the defendant no.2, and as such he wrote a letter to the defendant no.2 to revise the rate so that he could complete the work within the given time.

It is also the case of the plaintiff, that when he started the excavation of the river bank, he found that he was unable to do the digging the work, and as such, he got boring test done and found that up to the depth of 18 feet the sand was purely water charged and thereafter it was sandy clay. Hence, in order to secure stability of the bridge he recommended for construction of foundation trenches which had to go down to atleast the sandy clay level. For the aforesaid purpose of getting the boring test done and the initial work, he spent a sum of Rs.60,000/-. The amount spent by the plaintiff has been given in details in the plaint.

According to the plaintiff the rate should have been changed to Rs.210/-per thousand cubic feet up to the depth 3 feet for excavating in sand and for every further 3 feet depth or apart thereof an additional rate of Rs.10/-per thousand cubic feet and Rs.5/-per thousand cubic feet for pilling and extracting, by the respondents.

The plaintiff had sent a letter to the defendant no.2. In reply thereof, the S. D. O., Nawadah sent him a letter dated 25.1.1969 stating therein that the Department intended to get a fresh boring test

done departmentally for the purpose of the work in Item No.1 of the agreement.

The plaintiff on 28.11.1969 asked the Department to take steps for approving the rates as it would be impossible for the defendant to work on the rates mentioned in the contract. The matter was referred to the Superintending Engineer, Central Circle, Patna, P. W. D., however, no steps were taken for changing the rates. The plaintiff was asked to proceed with the work and was informed that the contract was for "all kinds of soil". The plaintiff has further stated that the defendant no.2 in fact, instead of taking steps to get boring test done, on 20.1.1970 informed the plaintiff to complete the work. Apart from the intimation by the S. D. O. the boring test would be done and the rate would be fixed, thereafter no other information was given to the plaintiff with respect to revision of the rates.

It is an admitted case of the parties that on 27.2.1970 notice was issued in "Indian Nation" inviting fresh tender for work which was to be submitted by 10.3.1970.

After invitation of the fresh tender the plaintiff had no option but to file the present suit.

A written statement has been filed on behalf of the State through the Additional Collector, Gaya in which the stand taken was that the contractor had agreed to do the work for "all kinds of soil", and as such, the demand for revision of the rates was not justified. It is also stated that the plaintiff was reminded by several letters to complete the work within the period indicated in the tender. It is

alleged that the plaintiff had not brought any tools on the site and there was nothing on the site to show that the bricks, stone-chips etc., had been gathered for the purpose of starting the work. It is specifically stated that the plaintiff only started digging the earth by using local un-skilled labourers and thereafter stopped the work and began to demand excess rate to be paid by the defendant. It is denied that the plaintiff had ever spent Rs.60,000/-at the site for doing the various kinds of work including the test work. The delay in completing the work led the defendants to issue a fresh tender and it has been stated that the conduct of the plaintiff is apparent from the fact that the plaintiff did not apply against the fresh tender, and as such, the suit filed by him for payment of the earnest money and payment of cost incurred by the plaintiff during the intervening period of the agreement and the fresh tender notice is not maintainable.

The Court below has found that the plaintiff is entitled to recover of Rs.17,560/- as earnest money deposited by the plaintiff. The court below has also found that the plaintiff is entitled to 1/3rd of the expenses incurred for the work done by him. The court below has rejected the plea of the plaintiff for grant of damages and compensation.

Before this Court, there are only two issues.

(1)Whether the plaintiff is entitled to a decree for refund of Rs.17560/-, the earnest money and security money deposited by the plaintiff at the time of entering into an agreement?

With respect to Issue No.1 that is whether the plaintiff is

entitled to refund of earnest money. The trial court has discussed in detail the letters issued by the plaintiff and receipt by him sent by the defendant no.2, to show that the plaintiff had taken due care to perform the work, and the allegation on behalf of the defendant that the plaintiff had violated the term of the agreement and was not entitled to payment of earnest money is unfounded.

The plaintiff had first informed the defendant no.2 vide letter dated 8.1.1969 with respect to the difficulties that arose while he was excavating the river bank for the purpose of construction of submersible bridge. It has been stated in the letter that from the boring test result, it appears that sandy clay is 18 feet deep below the bed level of the river whereas the plaintiff had to cut the soil up to 12 feet to 16 feet as per the plan supplied. It has further been stated that while digging the earth the plaintiff has found the soil in question was charged with water, and as such, they would require to do the Iron sheets piling for the purpose of doing the ground work for construction of the bridge.

In reply to the plaintiff's letter dated 8/12.1.1969, the S.D.O., P.W.D., issued a letter dated 20.1.1969 wherein he has stated that he does not have a certified copy of the agreement and has requested to the Executive Engineer, Gaya Division, Gaya, to send a copy and also informed the Executive Engineer regarding the difficulties faced by the plaintiff. The S.D.O. directed the plaintiff to begin the work and enumerated certain works that should be done by the plaintiff which included collection of bricks on the site, earth work

excavation, foundation of the walls, earth cutting with respect to the embankment. Exhibit-13/B is the letter which has been addressed to the Executive Engineer, P.W.D., Gaya Division, Gaya, by the plaintiff bringing to his notice the difficulties that were faced by the plaintiff in completing the works allocated in the agreement. However, there is no further communication between the plaintiff and the defendants to show that the final decision was taken for revising of the rates with respect to the Item No.1 of the agreement. Exhibit-13 series are the letters which have been exhibited on behalf of the plaintiff which also include the reply given by the defendants to the letters of the plaintiff. Notwithstanding the communication between the plaintiff and the defendants, the matter remained undecided and finally the defendants issued a fresh tender for the work in question on 27.2.1970.

The main thrust of the argument by the defendants with respect to the objections raised by the plaintiff is concerned with respect to Item No.1. Item No.1 of the agreement which is as follows:

“Earth work in excavation of foundation trenches in all kinds of soil below ground level with all leads and lifts including the cost of levelling and dressing of bottom and sides of trenches as per drawing, cutting the sides to proper slope for stability, shoring, shuttering, dewatering during progress of work and making coffer dam if necessary, removing and depositing the excavation earth up to 500’-0” away from river bank all complete as per circle specification and direction of Engineer-in-charge (Measurement of the work will be taken on the area of footing in plan multiplied by actual height”

2,04,010 cubic feet at the rate of Rs.11/-.” It has been submitted on behalf of the defendants that earth work and the trenches for “all kinds of soil” includes all work to be done with different types of soil, and as such, it has been submitted that the objection raised by the plaintiff is not justified. It has further been submitted in the court below as well as before this Court that the plaintiff ought to have started the work and further revision of rates would have been considered by the concerned Department after the work was so completed. According to the defendants, the plaintiff was not justified in delaying the matter and not completing the work as per the agreement.

On behalf of the plaintiff it has been submitted that the defendants have undertaken to conduct a soil test and thereafter to fix rates. The fact is that they did not conduct any soil test and instead asked the plaintiff to begin the work, so they had no intention of revising the rates. It is further been submitted that the defendants had not undertaken that they would have revised the rates or that they considered that the objections raised by the plaintiff were justified, rather their reply was to the effect that the digging work was for the purpose of construction a foundation of submersible bridge included “digging work of soil of all kinds.”

The counsel for the plaintiff refers to Exhibit- C/1 to demonstrate that in fact the contention of the plaintiff that the cost of Item No.1 should be enhanced is supported by this document. Exhibit- C/1 is the agreement which was prepared by the defendants after fresh

tender, in which the rate of Item No.1 has been enhanced 14 times over and has been fixed at the rate of Rs. 150/- per cubic feet which supports the case of the plaintiff that the rate of strike for Item No.1 was ridiculously low and the work described at Item No.1 could not have been undertaken at the rate of Rs.11/-per cubic feet.

After considering the documents and the submissions of the plaintiff, I agree that the findings of the trial court and held that the plaintiff is entitled to refund of earnest money of Rs.17560/-.

The second issue before this Court which was also the issue before the trial court is that, whether the plaintiff is entitled to Rs.60,000/-which he spent initially for the work done by him which includes the cost of testing the soil. The plaintiff to support his case has produced several documents which have been marked as Exhibits which include book of accounts, vouchers, receipts of the bridge items and vouchers for the higher items which have been marked as exhibits 12 series. These exhibits have been proved by the plaintiff. The witnesses have also been examined on behalf of the plaintiff as well as the defendants to show that in fact, the plaintiff had collected materials on the site and has also employed both the permanent staff and casual labourers. The exhibits-7 and 8 are the payment registers whereas exhibit-9 is the Khata Register. Several labourers have been examined to show that they had worked on the site. The depositions of the witnesses have been discussed in the order of the trial court and on perusal of the evidence there appears to be no reason to disagree with the analysis of the evidence as undertaken by the court below. The

appellants have also not been able to point out any reason why this Court should differ with the comments of the trial court.

On the other hand, the defendants had examined D.W.3, the Amin who had gone to the site in connection with the alignment of the road in the month of November, 1968. According to this witness, the plaintiff had not done any work. This witness has further stated that there were no hutments to show that the casual labourers were working on the site. This witness has further stated that no bricks and other building materials were found on the site.

In order to support their case that no work was actually done by the plaintiff, D.W.3 is the witness produced by the defendants. This witness has been disbelieved, in my opinion, on good grounds, as he has stated in the cross-examination that he had not been instructed by the S. D. O. or the Executive Engineer to excavate the site and further he has stated that he did not report the fact that no work was done on the site to the Executive Engineer or the S. D. O. at the relevant time and he has stated this fact for the first time during the trial of the case.

Therefore, from perusal of the evidences of the parties, regarding the fact whether the plaintiff had actually worked on the site and had collected some materials on the site for the purpose of excavation of the soil/earth is supported by several witnesses on the side of the plaintiff and only one witness on the side of the defendants (as discussed above).

The evidence led on this point is clearly favours the plaintiff, and as such, the court below has rightly held that the plaintiff

is entitled to 1/3rd of the demand made by him with respect to the cost of construction.

The plaintiff-respondent in this case has filed a cross objection on 14.8.1984 in which the plaintiff has raised an objection that he should have been paid entire cost of the work incurred by him and the trial court has wrongly reduced the cost of work to 1/3rd of the demand made by him with respect to the cost on construction. The plaintiff has also raised an objection that he was entitled to 6% interest on the decretal amount.

As far as first objection of the plaintiff is concerned with respect to the amount incurred by him for performing the work should be paid before a fresh agreement was signed between the State-defendant and the contractor, I am not inclined to grant the prayer of the plaintiff in view of the fact that the court below while reducing the cost assessed by the plaintiff, has probably considered the fact that the documents that were prepared by the plaintiff himself and not approved the counter-signed by any authorities and therefore, taking into account this fact this Court justified feels that the court below was in reducing the cost incurred by the plaintiff.

As far as the prayer with respect to the interest, I do feel that the plaintiff is entitled to payment of interest at the rate of 6% per annum rate with respect to the earnest money payable by the State-respondent from the date of the judgment till the date of the actual payment.

In the result, this First Appeal is dismissed and the cross-objection is allowed to the extent mentioned above. However, there will be no order as to cost.

Patna High Court
Dated 02.09.2008.
A.F.R./U.K./
Secretary.

(Sheema Ali Khan,J)

